No. 89-1194

In the Supreme Court of the United States

OCTOBER TERM, 1989

PARK CENTER WATER DISTRICT, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF COLORADO

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Colorado Supreme Court correctly held that the United States holds a reserved water right to water from a well located on federal lands which have been withdrawn and reserved pursuant to the Oil and Gas Conversion Act of 1934, 30 U.S.C. 229a.

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OPINIONS BELOW

The opinion of the Colorado Supreme Court (Pet. App. 1-20) is reported at 781 P.2d 90. The findings of fact, conclusions of law and decree of the district court (Pet. App. 21-51) are unreported.

JURISDICTION

The judgment of the Colorado Supreme Court was entered on October 23, 1989. The petition for a writ of certiorari was filed on January 19, 1990. The jurisdiction of this Court is invoked under the Act of June 27, 1988, Pub. L. No. 100-352, § 3, 102 Stat. 662 (to be codified at 28 U.S.C. 1257(a)).

STATEMENT

In this action, the Colorado Supreme Court unanimously affirmed a determination and decree of the District Court, Water Division No. 2, State of Colorado (water court), which held that the United States has a reserved water right to 2.67 cubic feet per second (cfs) from a well situated on federal lands that have been withdrawn and reserved pursuant to the Act of June 16, 1934 (Oil and Gas Conversion Act of 1934), 30 U.S.C. 229a.

1. Congress enacted the Oil and Gas Conversion Act of 1934 (Conversion Act), ch. 557, 48 Stat. 977, 30 U.S.C. 229a, as an amendment to the Mineral Leasing Act, 30 U.S.C. 181 *et seq.* See Pet. App. 52-53. Subsection (a) of the Conversion Act provides, in substance, that where a federal oil and gas lessee strikes water instead of oil or gas, "the Secretary of the Interior may, when such water is of such quality and quantity as to be valuable and usable at a reasonable cost for agricultural, domestic, or other purposes, purchase the casing in the well." Until 1976, Subsection (a) further stated that "the land on which such well is situated shall be reserved as a water hole under section 10 of the Act of December 29, 1916."[1] Subsection (c) provides that

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[1] The Act of Dec. 29, 1916, ch. 9, § 2, 39 Stat. 862, is popularly known as the Stock-Raising Homestead Act (SRHA). Section 10 of the SRHA stated that "lands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated under this Act but may be reserved * * * and such lands heretofore or hereafter reserved shall, while so reserved, be kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe." Section 10 was repealed in 1976 (and

where the well casing is so purchased, the Secretary "may lease or operate such wells for the purpose of producing water and of using the same on the public lands or of disposing of such water for beneficial use on other lands." Finally, Subsection (d) states that the Secretary "may use the proceeds from the sale or other disposition of * * * water [under the Act] as a revolving fund for the continuation of such program, and such proceeds are hereby appropriated for such purpose.

2. The Park Center Well was drilled prior to the enactment of the Conversion Act on federal lands in Colorado as an exploratory well for oil and gas under the Mineral Leasing Act. The well never struck oil or gas; rather, it intercepted water under artesian pressure. After passage of the Conversion Act, the 40-acre legal subdivision containing the well was withdrawn on September 27, 1934, pursuant to Order of Interpretation No. 209 and the Executive Order of Withdrawal dated April 17, 1926, also known as Public Water Reserve No. 107. In June 1935, the artesian flow of water from the well was measured at 2.67 cubic feet per second. In 1936, the United States purchased the casing of the well under the Conversion Act. Pet. App. 2-5, 22.

Since 1937, all the water from the well has been used by petitioner or its predecessor, the Canyon Heights Irrigation and Reservoir Company (Canyon

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conforming amendments were made to Section (a) of the Conversion Act) by Section 704 of the Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2792, but all withdrawals in force at that time remained in force until specifically revoked or changed in accordance with the 1976 Act. See *United States* v. *City and County of Denver (Denver I)*, 656 P.2d 1, 31 n.47 (Colo. 1983).

Heights), under a series of leases issued by the United States. Every lease, including the current lease, has contained the following provision:

> The furnishing of water hereunder shall under no circumstances become the basis of a permanent water right.

Pet. App. 5.

In 1972, petitioner and Canyon Heights filed an application in the water court for a water right to the Park Center Well. Pet. App. 5. On April 24, 1973, the water court entered a decree awarding a water right to Park Center in the well for 708 gallons per minute (1.58 cfs) for domestic and irrigation purposes with a priority date of January 8, 1938. *Ibid.*; Pet. App. 54-57. The United States had not yet been joined in the Division No. 2 proceedings when the 1973 decree issued. Pet. App. 6.

3. Pursuant to the McCarran Amendment, 43 U.S.C. 666, the United States was joined as a party to the general adjudication of water rights in Water Division No. 2 in May 1979. In December 1979, the United States filed a general application for claims of federal reserved water rights and state appropriative rights. The application sought, among other things, confirmation of water rights to all Conversion Act wells within Water Division No. 2. Thereafter, the United States filed an amended application specifically claiming 2.67 cfs from the Park Center Well, with a priority date of May 29, 1936, for domestic, municipal and irrigation use. Petitioner and the State of Colorado filed statements of opposition.[2] The United

[2] Although the State of Colorado filed a statement of opposition, and a supplemental statement of opposition, it made no further filings in opposition to the federal government's claim. Certain private parties in addition to petitioner likewise

States subsequently moved for summary judgment on its claim. Pet. App. 7-10, 25-31.

The water court entered findings of fact, conclusions of law, and a decree (Pet. App. 21-51) granting the motion for summary judgment and decreeing to the United States a reserved water right "to 2.67 cfs out of the Park Center Well * * * with antedated priority of May 29, 1936, for domestic, municipal and irrigation purposes." [3] Pet. App. 50. The water court found that petitioner was collaterally estopped from challenging the United States' claim because petitioner had asserted the same purported water right in administrative proceedings before the Department of the Interior; the issue had been resolved against petitioner; and petitioner did not seek judicial review of the determination. Pet. App. 31-35.[4] The water

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initially filed statements of opposition, but these oppositions were later withdrawn or dismissed prior to entry of the water court's decree. Pet. App. 29.

[3] Although the United States normally would have been entitled to a priority date of September 27, 1934, the date on which the subdivision in which the well is located was withdrawn and reserved, the United States agreed to accept the May 29, 1936 priority date, as this was the date which had been listed in the government's application. Pet. App. 11 n.12, 43-44.

[4] In 1976, petitioner took an administrative appeal to the Interior Board of Land Appeals (IBLA) from an order of the Bureau of Land Management (BLM) increasing the rate payable for water provided from the Park Center Well. Among other things, petitioner contended that it held a water right pursuant to Colorado law to the water from the well and, accordingly, the BLM was precluded from imposing any additional charges on the water. The IBLA rejected this contention, concluding that "the right to the use of the water is and always has been vested in the United States." *Park Center Water District and The Canon Heights Irrigation and*

court likewise found that petitioner was estopped under the terms of its lease, which denied that the arrangement could become "the basis of a permanent water right," from challenging the federal water right claim. Pet. App. 35-36. After considering the purposes of the Conversion Act, the court then ruled that the United States is entitled to a reserved right to 2.67 cfs of water from the well. Pet. App. 36-44, 50. The court also held that the claim had been timely filed under Colorado law so that it had priority over petitioner's 1973 decree. Pet. App. 44-47.

4. The Colorado Supreme Court affirmed in a unanimous opinion. Pet. App. 1-20. The court agreed with the water court "that the United States, by virtue of the Conversion Act, reserved the right to the use of water flowing from the converted wells." Pet. App. 16. It identified the purposes of the Conversion Act as first, providing water for beneficial use on both reserved and private adjacent land and, second, raising proceeds from the sale of well water to finance the program of converting more wells. As to the extent of the right, the Colorado Supreme Court followed its previous decision in *United States* v. *City and County of Denver*, 656 P.2d 1 (Colo. 1983) (*Denver I*), which in turn relied on this Court's decisions in *Cappaert* v. *United States*, 426 U.S. 128 (1976), and *United States* v. *New Mexico*, 438 U.S. 696 (1978). The state court therefore noted that its task was to "determine the precise quantity of water—the minimal need as set forth in *Cappaert* and *New Mexico*—required for [the purposes of the Conversion

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Reservoir Co., 28 I.B.L.A. 368, 373 (1977). The IBLA also found that petitioner was estopped under the terms of its lease from claiming a permanent right to the use of water from the well. *Id.* at 376.

Act]." Pet. App. 16 (quoting *Denver I*, 656 P.2d at 20). Applying this standard, the court found that the claimed amount of 2.67 cfs, which was the entire artesian flow of the well in 1935 prior to the issuance of the initial lease, "is no more than the amount of water needed to fulfill the purpose of the reservation." Pet. App. 17. The court also ruled that the federal government's claim was entitled, under Colorado law, to priority over petitioner's 1973 decree, which had issued before the United States had been joined in the litigation. Pet. App. 17-19. In view of its disposition of these matters, the court found it unnecessary to reach the estoppel issues. Pet. App. 19 n.22.

ARGUMENT

The unanimous decision of the Colorado Supreme Court is correct and does not conflict with any decision of this Court or any other court. Nor does the petition present any important, recurring issue of law warranting review by this Court.[5]

1. The Property Clause of the United States Constitution, Art. IV, § 3, empowers Congress to enact legislation affecting the use and disposition of unappropriated non-navigable waters on federal lands. See *Cappaert*, 426 U.S. at 138; *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142, 162 (1935). The Conversion Act represents a highly unusual form of exercise of that authority. Unlike most statutes concerning the reservation of federal lands, which contain no mention of water and which, therefore, require ascertainment of implied congressional intent whenever matters concern-

[5] As the court below noted (Pet. App. 14-15), the instant decision is apparently the first reported federal case involving the Conversion Act.

ing water rights arise, the Conversion Act expressly mentions, indeed exclusively concerns, water.

Subsection (c) of the Conversion Act provides that where the government has purchased the casings of oil and gas wells on federal lands, the Secretary "may *lease* or operate such wells for the purpose of producing water and of using the same on the public lands or of disposing of such water for beneficial use on other lands." Emphasis added. Subsection (d) provides that the Secretary "may use the proceeds from the *sale* or other disposition of such water as a revolving fund for the continuation of such program." Emphasis added. The legislative history of the Conversion Act confirms that its purposes are to authorize the Secretary to purchase the casings of oil and gas wells and "to lease or operate such wells for the production and disposal of the water where the water is valuable for agricultural or domestic use." S. Rep. No. 1378, 73d Cong., 2d Sess. 2 (1934) (quoting incorporated Letter from Secretary Harold Ickes to Senator Robert Wagner (June 9, 1934)). Because the water flow from the well is needed to accomplish these purposes, the United States has a reserved water right to that flow.[6]

Despite the clear statutory language that the Secretary "may *lease* or operate" the wells to produce or use water on the public lands or on other lands

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[6] The United States has here sought and been awarded a federal reserved right to 2.67 cfs, which was the entire production of the well when it was measured in June 1935, shortly before it was leased to Park Center's predecessor. The United States has acknowledged that this reserved right does not allow the federal government to increase the flow of the well beyond 2.67 cfs by some artificial means, such as pumping, and have that increased flow relate back to the date of reservation. Pet. App. 17 n.19.

(30 U.S.C. 229a(c) (emphasis added)) and "may use the proceeds from the *sale or other disposition of such water*" to support continuation of the program (30 U.S.C. 229a (d) (emphasis added)), petitioner contends (Pet. 17-23) that the Conversion Act does not, in fact, authorize the Secretary to lease or otherwise require payment for the use of water from Conversion Act wells. Petitioner points out (Pet. 20) that Subsection (c) of the original bill was amended in committee by striking out certain words in the original version which referred to selling, leasing, or purchasing water, and adding new language providing that the water was to be used for beneficial use.

These amendments, however, do not indicate a congressional intent to change the bill so as to deny the Secretary authority to lease the water. If that had been the intent, the committee would have also stricken the words "lease or" where they appear in the phrase which provides that the Secretary "may lease or operate such wells." Likewise, the committee would have amended Subsection (d) by eliminating the reference to "the proceeds from the *sale* or other disposition of such water."

The Senate report in fact discloses that all of the amendments that were incorporated into the final version of the bill were adopted verbatim as suggested in a letter of the Secretary of the Interior commenting upon the bill. S. Rep. No. 1378, *supra*, at 2. The Secretary's letter, which is reproduced in the Senate report, described the bill as one authorizing him "to purchase the casing in wells drilled under oil and gas permits and leases which strike water instead of oil or gas, and to lease or operate such wells for the production and disposal of the water where the water is valuable for agricultural or domestic

use." *Ibid.* There is no hint in the letter of any intent to change this purpose. Shortly after the bill was enacted, the Secretary issued regulations providing, among other things, for the leasing of water from Conversion Act wells. 30 C.F.R. Pt. 241 (1983); see Pet. App. 16 n.18. If petitioner's theory were correct, the Secretary, having himself suggested the amendatory language in order to bar the United States from charging for the use of water, then issued regulations immediately after passage of the statute that were directly contrary to the intent of the very amendments he had just suggested. Such an assumption is wholly implausible.

2. Petitioner points out (Pet. 15-23) that Subsection (a) of the Conversion Act provides that the lands on which the wells are situated shall be reserved as water holes under Section 10 of the SRHA. In petitioner's view, this makes applicable the Colorado Supreme Court's ruling in *Denver I*, 656 P.2d at 31-33, 36, that the extent of federal reserved water rights for public springs and water holes withdrawn under Section 10 of the SRHA is limited to the minimal amount necessary for the purposes of preventing the monopolization of water needed for domestic and stockwatering purposes.

The flaw in this argument, as the Colorado Supreme Court recognized (Pet. App. 13-17), is that it entirely fails to recognize that the right to the use of water flowing from the converted wells rests not only on Section 10 of the SRHA, but also on the Conversion Act, with its distinct statutory purposes. Unlike withdrawals made solely under Section 10 of the SRHA, which contemplated only that enough water should remain in the water holes to allow such use as may be made by the public, the Conversion Act expressly authorizes the Secretary to lease or operate

the wells to produce water both for use on public lands and "for beneficial use *on other lands*." 30 U.S.C. 229a(c) (emphasis added). The Conversion Act does not restrict the Secretary to lease only when, and in such amounts as, such leasing may be necessary to prevent monopolization.

3. Petitioner complains (Pet. 7-15) that the Colorado Supreme Court repudiated the approach articulated by this Court in *United States* v. *New Mexico*, *supra*, that, under the "implied-reservation-of-water" doctrine, Congress is assumed to have reserved " 'only that amount of water necessary to fulfill the purpose of the reservation, no more' " when it reserves federal land. *Id.* at 700 (quoting *Cappaert*, 426 U.S. at 141). We note at the outset that application of the implied-reservation-of-water doctrine is required only when "the reservation [of water] is implied, rather than express." See *New Mexico*, 438 U.S. at 701. This case in fact involves a statute, the Conversion Act, which makes express provision for the use of water from federally owned wells.

But in any case, the Colorado Supreme Court explicitly applied the standard set forth in *New Mexico* and *Cappaert*, according to which the court is to:

> determine the precise federal purposes to be served by [the] legislation; determine whether water is essential for the purposes of the reservation; and finally determine the precise quantity of water—the minimal need as set forth in *Cappaert* and *New Mexico*—required for such purposes.

Pet. App. 13 (quoting *Denver I*, 656 P.2d at 20). As we have recounted above, the court in this case determined the federal purposes to be served by the Conversion Act (see Pet. App. 16), and determined

the quantity of water minimally needed to fulfill those purposes (see Pet. App. 16-17). Petitioner simply disagrees with the application of the *New Mexico* standard to the facts of this case.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1990

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[7] Moreover, even if petitioner's arguments concerning the extent of the Conversion Act reserved water right were meritorious, the United States would nonetheless prevail in this case on alternative grounds. As the water court correctly ruled (Pet. App. 31-35), petitioner is collaterally estopped from challenging the United States' reserved water right claim because that same issue had already been resolved against petitioner in the 1977 IBLA decision. Furthermore, as the water court also properly ruled (Pet. App. 35-36), petitioner is estopped under the terms of its lease from claiming a permanent water right in the Park Center Well.

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PARK CENTER WATER DISTRICT,

Petitioner,

v.

UNITED STATES OF AMERICA, STATE OF COLORADO, AND DIVISION ENGINEER, WATER DIVISION NO. 2,

Respondents.

REPLY BRIEF OF PARK CENTER WATER DISTRICT

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REPLY BRIEF OF PARK CENTER WATER DISTRICT

ARGUMENT

In its Brief In Opposition to Park Center's Petition, the United States argues: (a) that there is an alternative state law basis for affirming the decision below, and (b) that the Conversion Act *expressly* reserves water from converted oil and gas wells. Neither argument survives even a cursory analysis.

I. THE QUESTION PRESENTED IS SOLELY A MATTER OF FEDERAL LAW AND THERE IS NO ALTERNATIVE GROUND UPON WHICH THE UNITED STATES CAN RELY.

The United States claims that it would "nonetheless prevail in this case on alternative grounds" even if the Colorado Supreme Court incorrectly applied the implied-reservation-of-water doctrine to the Park Center Well. U.S. Br. 12 n. 7. In support of this assertion, the United States explains that the water court "correctly" and "properly" ruled that Park Center is estopped from claiming a water right and from challenging the United States' reserved water right. This explanation, however, represents solely the opinion of the United States and not the Colorado Supreme Court. The Colorado Supreme Court specifically did *not* express an opinion on the estoppel issues. *See* Pet. App. 12 n. 13; 19 n. 22. There is, therefore, no determination with regard to the correctness of the water court's estoppel rulings. As such, there are no alternative grounds for the United States to rely on. Indeed, under the circumstances, it would appear that the

Colorado Supreme Court found little merit in the estoppel arguments. Instead of resolving the case on these state law grounds, the court proceeded to resolve the more difficult federal reserved water right questions.

II. THE CONVERSION ACT DOES NOT *EXPRESSLY* RESERVE WATER FROM CONVERTED OIL AND GAS WELLS.

The United States off-handedly remarks that the implied-reservation-of-water doctrine is not even applicable in this case because the reservation of water is *express*. U.S. Br. 11. The scant attention given to this assertion belies the propriety of raising it in the first place. The United States made a similar argument to the water court, *see* Pet. App. 39-40, but conceded on appeal that the implied-reservation-of-water doctrine applied in this case. *See* Pet. App. 11-12. Nevertheless, now that the United States has resurrected the argument, it must be dispensed with once and for all.

The apparent basis for the United States' claim that the Conversion Act provides an express reservation of water is its perception that the Conversion Act is somehow different from other land reservation statutes because the Conversion Act expressly "mentions" and "concerns" water. Admittedly, the Conversion Act is different from other land reservation statutes; not because it mentions or concerns water but because, quite simply, it is *not* a land reservation statute. Instead, the Conversion Act authorizes a well casing purchase program that addresses two separate and distinct property interests – the well structure, and rights to the water flowing from that

well structure. Despite the United States' attempt to equate the two, the well structure and the water flowing from it are treated differently in the act. Only the well structure was to be purchased. Once purchased, that structure could be leased or operated to recover the costs associated with the well casing purchase program. There is, however, no express authorization in the Conversion Act to lease the water. Congress did not, in the Conversion Act, deviate from its traditional deference to the states in the control and allocation of water on federal lands. Thus, with the exception of the water impliedly reserved for the underlying public water hole land reservation, any rights to the water flowing from the well structure were to be obtained in accordance with state water allocation rules.

Moreover, the United States' suggestion that the "difference" between the Conversion Act and other land reservation statutes is attributed to the fact that the Conversion Act mentions and concerns water is not even accurate. There are a number of land reservation statutes that mention and concern water. The Organic Administration Act of 1897, 16 U.S.C. §§ 473 *et seq.*, for example, authorized the set aside of national forests for the purpose of, *inter alia*, securing favorable conditions of *water flows*. President Truman's Proclamation pursuant to the Antiquities Act of 1906, 16 U.S.C. § 431, with regard to Devil's Hole (Proclamation No. 2961) withdrew from the public domain a tract of land that contained a remarkable underground *pool of water*. And Public Water Reserve No. 107 issued pursuant to the Stock Raising Homestead Act, 43 U.S.C. §§ 291 *et seq.*, withdrew from entry and settlement public lands that contained *springs or water holes*.

Despite such references to and concerns with water, the federal reserved water rights associated with these federal enclaves, which were determined in accordance with the implied-reservation-of-water doctrine, do *not* extend to: (a) the entire flow of water in national forests, *see United States v. New Mexico*, 438 U.S. 696 (1978); (b) the highest level of water in the Devil's Hole pool, *see Cappaert v. United States*, 426 U.S. 128 (1976); or (c) the entire yield of public springs and water holes, *see United States v. City and County of Denver*, 656 P.2d 1 (Colo. 1983).

Indeed, the United States' reliance on the fact that the Conversion Act mentions or concerns water highlights a fundamental misunderstanding of the implied-reservation-of-water doctrine. The basic rationale for federal reserved water rights is that the water necessary for the primary purpose of the land reservation needs to be protected from diversion and use by private appropriators. *See, e.g., U.S. v. Jesse*, 744 P.2d 491, 498 (Colo. 1987). Thus, with regard to national forest lands, a certain amount of water has been reserved for those lands so that private appropriators cannot divert it away, thereby defeating the primary purpose of the forest land reservation (*i.e.*, timber production and watershed protection). *See United States v. New Mexico*, 438 U.S. 696 (1978). Similarly, with regard to Devil's Hole, a certain water level in the pool was needed to maintain the pupfish – the object of that land reservation. *See Cappaert v. United States*, 426 U.S. 128 (1976). That level had to be protected against private appropriators who were withdrawing water from the same groundwater aquifer. *Id.*

There was never a similar intention to protect *all* of the water of Conversion Act wells from private appropriators. To the contrary, the intent was, in large measure, no different than the goal of the Organic Administration Act in which "Congress authorized the national forest system principally as a means of enhancing the quantity of water that would be available to the settlers of the arid West." *United States v. New Mexico*, 438 U.S. at 713. Similarly, in the Conversion Act, Congress authorized the well casing purchase program as a means of preserving the artesian flow of water from these converted oil and gas wells so that the water could be made available for use by private appropriators. The Senate discussion on the bill could be no clearer on this point. *See* 1934 Cong. Rec. 11,116-117.

CONCLUSION

As a final matter, Park Center directs this Court's attention to what is absent from the United States' Opposition Brief. The United States' refusal to address the points raised in the Petition about the Colorado Supreme Court's clear departure from the *New Mexico* rule underscores the importance of this case. Like the Colorado Supreme Court, the United States ignores the *land reservation* predicate and the *primary purpose* limitation. The United States' only response is that the Colorado Supreme Court must have applied the *New Mexico* rule correctly because: (a) the court said as much, and (b) the court "determined the federal purposes to be served by the Conversion Act." U.S. Br. 11-12. Obviously, this is not the standard that this Court established in *New Mexico*.

The Colorado Supreme Court was required to identify the primary purpose of the land reservation, not simply the purposes to be served by the Conversion Act. By failing to identify that primary purpose, the Colorado Supreme Court was unable to quantify the minimal amount of water necessary to ensure that that purpose is not entirely defeated.

For these various reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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